BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE JUAN SOLIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,048,861
QUALITY GRANITE & MARBLE, INC.	)	
Respondent	)	
	)	
AND	)	
	)	
STARNET INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 5, 2012, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on July 20, 2012, in Wichita, Kansas. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties agreed claimant's name is Jose Juan Solis. The parties also agreed that on the date of claimant's alleged accident, his average weekly wage was $790.46 and that from March 1, 2011, through April 30, 2011, claimant had wages of $300.00 per week.

ISSUES

In the April 5, 2012, Award, ALJ Clark: (1) determined claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent on

December 10, 2009; (2) determined claimant sustained a 10% whole body functional impairment as a result of his December 2009 work-related accident; and (3) denied claimant's request for a work disability award, because claimant has never been legally admitted to or authorized to work in the United States.

Claimant asserts he is entitled to a work disability. In support of his assertion, claimant cites the Board's *Fernandez*[1] order, which is awaiting a decision by the Kansas Supreme Court. Claimant also points to the Workers Compensation Act and the cases of *Bergstrom*[2] and *Casco*[3] and states:

> The plain language of the Kansas Workers' Compensation Act does not contain a bar for an undocumented immigrant to obtain benefits. The Kansas Supreme Court has sent a clear message through *Bergstrom* and *Casco* that the Court is to strictly construe each statute. If the Kansas Legislature desired to eliminate undocumented aliens from receiving benefits, it would have done so. Absent appropriate statutory language disqualifying an undocumented alien from work disability, the ALJ's holdings should be reversed.[4]

Respondent's first defense is that claimant did not sustain a personal injury by accident arising out of and in the course of his employment. It also contests the ALJ's finding that claimant sustained a 10% permanent impairment of function. However, respondent asks the Board to affirm the ALJ's finding that claimant should not be awarded a work disability. It argues claimant is not eligible to lawfully work in the Unites States and respondent should not be punished by being ordered to pay a work disability award when by law it cannot bring claimant back to work to avoid that liability.

The issues before the Board on this appeal are:

1. Did claimant sustain a personal injury by accident on December 10, 2009, arising out of and in the course of his employment with respondent?

2. What is claimant's permanent functional impairment?

3. Is claimant entitled to work disability benefits? If so, what is the nature and extent of claimant's work disability?

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[1] *Fernandez v. McDonald's*, No. 1,036,799, 2010 WL 3489639 (Kan. WCAB Aug. 25, 2010), *appealed and transferred to the Kansas Supreme Court* (2010).

[2] *Bergstrom v. Spears Manufacturing Co.,* 289 Kan. 605, 214 P.3d 676 (2009).

[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[4] Claimant's Brief at 2 (filed May 21, 2012).

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant is a native of Mexico and speaks English well enough that the services of an interpreter were not necessary at his evidentiary deposition. At the time of his September 9, 2011, deposition, claimant had been in the United States for nine years and admitted he was an undocumented worker. On a previous occasion he tried to enter the United States under the name of Antonio Ramos Reyes, but was caught and sent back to Mexico. He testified he has had no problems with the law since arriving in the United States. Claimant was deposed in the Chase County, Kansas, jail because he was apprehended at his home in Wichita by Immigration and Customs Enforcement (ICE) on May 2, 2011, and was scheduled to be deported on September 16, 2011. He testified he told ICE that his name was Antonio Ramos Reyes. Claimant testified that he suspected his boss, Sally Boward, called ICE. Claimant's wife and four children are in the United States.

Prior to his accident, claimant had worked for respondent approximately two years. Respondent, according to claimant, was aware of his illegal status. Claimant testified that he was told by Ms. Boward to leave respondent's yard through a hole in the fence if ICE came. He testified that in the past, ICE had conducted a search of respondent's premises for illegal aliens.

On December 10, 2009, claimant was assisting a co-worker move a 12-foot countertop from a worktable to a cart when he twisted to move the countertop and immediately felt pain in his back. Claimant reported the injury to Ms. Boward and an hour later was sent home. The next day claimant's back was still hurting, so he called Ms. Boward to tell her his back was not any better. He testified that Ms. Boward said she was looking for a doctor as claimant did not have insurance.

Claimant went to an immediate care clinic in Wichita, Kansas, where x-rays were taken and medication prescribed. He then went to physical therapy for a period of time. Claimant testified that he kept respondent apprised of his situation. Eventually claimant was referred to orthopedic surgeon Dr. John P. Estivo. Claimant's medical bills were paid by respondent.

Claimant was released on May 6, 2010, by Dr. Estivo. Claimant indicated he was terminated by respondent sometime after October 5, 2010, the date a preliminary hearing had been scheduled, wherein he was seeking additional medical treatment. In March and April 2011, claimant worked for some friends in Tulsa, Oklahoma. He was paid $500.00 per week, but had expenses of $200.00 per week for a weekly income of $300.00. Claimant lost that job because he was apprehended by ICE.

Dr. Estivo testified that he first saw claimant on February 11, 2010, for a complaint of low back pain. Claimant told Dr. Estivo the back injury occurred while lifting granite countertops. Dr. Estivo's initial diagnosis was lumbar radiculopathy. An MRI was ordered by Dr. Estivo, which revealed a protruding disc at L5-S1 on the left. He diagnosed claimant with a herniated disc at L5-S1 and recommended epidural injections and physical therapy. He prescribed claimant medication including a pain reliever, an anti-inflammatory drug and a muscle relaxant. The doctor also gave claimant temporary restrictions. Claimant had two epidural injections, but declined the offer by Dr. Estivo of a third because the low back condition and lower extremity pain had improved. On May 6, 2010, after four weeks of work conditioning administered by a physical therapist, Dr. Estivo met with claimant. At that visit, claimant indicated he was occasionally having some discomfort in the low back, but was no longer having radicular symptoms. Dr. Estivo released claimant and assigned him a permanent restriction of lifting no more than 50 pounds.

Dr. Estivo found claimant to be in DRE Category II of the AMA *Guides*[5] and assigned claimant a 5% permanent whole body functional impairment. He indicated he gave claimant a 5% impairment because there was no objective evidence of radiculopathy, loss of muscle circumference of two centimeters to the affected leg, or decreased reflexes. He opined claimant is not in need of any further medical treatment, but he may need to seek medical care if he has flare-ups or other problems. Dr. Estivo opined claimant could no longer perform 5 of 17 non-duplicative job tasks identified by vocational expert Karen Crist Terrill for a 29% task loss.

It was acknowledged by Dr. Estivo that the effects of epidural injections often provide only a few months of temporary relief. He also agreed that once claimant discontinued taking the anti-inflammatory medication, his symptoms could return. The same would be true of the muscle relaxant. Dr. Estivo confirmed that claimant's physical condition could have changed after their last visit.

At the request of his attorney, claimant was evaluated on September 17, 2010, by orthopedic physician Dr. Edward J. Prostic. His report states:

> His history is consistent with protrusion of the L5-S1 disc with mild right S1 radiculopathy. He needs to continue at most medium-level employment with avoidance of frequent bending or twisting at the waist, forceful pushing or pulling, or captive positioning. He needs to minimize use of vibrating equipment. Appropriate treatment at this time is intermittent heat or ice and massage, therapeutic exercises, and anti-inflammatory and analgesic medicines as required for comfort.[6]

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] Prostic Depo., Ex. 1 at 2-3.

Dr. Prostic opined that pursuant to the *Guides*, claimant had a 10% whole body functional impairment for his low back injury. Dr. Prostic was not asked why he assigned claimant a 10% whole body impairment, but his report indicated claimant had mild right S1 radiculopathy. When Dr. Prostic was deposed, he opined claimant had the same permanent restrictions as those given on September 17, 2010. He opined claimant could no longer perform 15 of 17 non-duplicative job tasks identified by Ms. Terrill for an 88% task loss.

By order of ALJ Clark, on November 15, 2010, Dr. Vito J. Carabetta, a physical medicine and rehabilitation physician, conducted an independent medical evaluation of claimant. Claimant also told Dr. Carabetta the injury occurred while lifting granite countertops. Dr. Carabetta's impression was that claimant had a lumbosacral disc herniation. He placed claimant in DRE Category III of the *Guides* and assigned claimant a 10% permanent whole body functional impairment. He stated in his report, "As the disk herniation does approximate the nerve root openings, and he does clearly have radicular symptoms, his presentation is consistent with a Category III situation."[7]

Dr. Carabetta indicated claimant had a restriction of not lifting more than 50 pounds, and that restriction should remain in place. In his report, Dr. Carabetta stated that claimant was returned to work in May 2010 with the 50-pound lifting restriction and continued working until October 2010. Dr. Carabetta did not give an opinion on task loss and was not deposed.

Karen Crist Terrill was the only vocational expert who ascertained the job tasks claimant performed in the 15 years prior to his accident and his loss of wages. She did so at the request of claimant's attorney and personally interviewed claimant on January 4, 2011. Her report indicates claimant's last day of work was October 20, 2010. When Ms. Terrill was deposed on October 14, 2011, she was aware that claimant was no longer in the United States. Ms. Terrill identified 17 non-duplicative job tasks that claimant performed in the 15 years prior to his accident. She admitted not checking with claimant's employers to verify his job descriptions.

ALJ Clark determined claimant sustained a personal injury arising out of and in the course of his employment with respondent, that claimant's average weekly wage was $790.46, that claimant had a 10% permanent whole body functional impairment and that claimant was not entitled to a work disability. In determining that claimant had a 10% permanent whole body impairment, ALJ Clark adopted the opinion of Dr. Carabetta. ALJ Clark denied claimant a work disability and in his Award stated: "[I]t is this Court's

[7] Carabetta IME Report at 3.

conclusion that it is impossible for him to have a work disability claim and he is limited in his recovery to his 10% functional impairment."[8]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[9]

Respondent argues claimant failed to meet his burden of proving that he sustained a personal injury by accident on December 10, 2009, arising out of and in the course of his employment. The thrust of respondent's argument is that claimant committed a crime by entering the United States and, therefore, claimant is not a credible witness. Respondent also asserts that claimant's accident was not witnessed by anyone other than claimant. The Board rejects this argument and finds claimant sustained a personal injury by accident on December 10, 2009, arising out of and in the course of his employment.

Claimant's testimony that he sustained a back injury on December 10, 2009, when assisting a co-worker move a 12-foot countertop is uncontroverted. He reported the accident to Ms. Boward shortly after it occurred and was sent home one hour later. Claimant told Drs. Estivo and Carabetta the back injury occurred while lifting a granite countertop and corroborated that in the September 9, 2011, evidentiary deposition. Claimant is no less credible than the respondent which employed claimant when it knew he was an illegal alien. Additionally, respondent's employee, Ms. Boward, gave claimant instructions on how to escape if ICE arrived on respondent's premises.

Respondent contends the ALJ erred in finding claimant sustained a 10% permanent whole body impairment as opined by Drs. Prostic and Carabetta. It asserts the ALJ should adopt the opinion of Dr. Estivo that claimant has a 5% permanent whole body impairment.

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[8] ALJ Award (Apr. 5, 2012) at 4.

[9] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

However, Dr. Estivo agreed that claimant had some benefit from epidural steroid injections, and those benefits could wane. Claimant was last examined by Dr. Estivo on May 6, 2010; by Dr. Prostic on September 17, 2010; and by Dr. Carabetta on November 15, 2010. Claimant had symptoms of radiculopathy when he saw Drs. Prostic and Carabetta. The Board finds the opinions of Drs. Prostic and Carabetta to be more credible, given the timing of their evaluations and claimant's complaints to them of radiculopathy. Accordingly, the Board concludes claimant has a 10% permanent impairment to the body as a whole.

The central issue in this claim is whether claimant is entitled to receive permanent partial disability benefits based upon a work disability. Because claimant has never been legally admitted to or authorized to work in the United States, the ALJ concluded it was impossible for claimant to have a work disability. The Board respectfully disagrees and finds that claimant is entitled to a work disability.

K.S.A. 44-510e(a)(1) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

K.S.A. 44-510e does not state that the employee is required to attempt to work or that the employee is capable of engaging in work for wages equal to 90% or more of the pre-injury average weekly wage. In essence, *Bergstrom* says a fact finder should only compare an injured worker's pre- and post-injury wages to determine the worker's wage loss and the reason for the wage loss is irrelevant. After *Bergstrom* and before the revisions to the Act that took effect on May 15, 2011, it no longer mattered why an injured worker has no post-injury wages. If an injured worker has no post-injury wages because he or she chooses not to work, goes to prison, the employer discharges the worker for good cause, or as in the instant claim, cannot legally work and is deported, the injured worker has a 100% wage loss. Consequently, when the express language of K.S.A. 44-510e is observed, claimant's actual post-injury earnings must be used in computing his permanent partial general disability.

K.S.A. 2009 Supp. 44-508(b) states in part, "'Workman' or 'employee' or 'worker' means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer."

Recently, the Kansas Court of Appeals dealt with the issue of whether an illegal alien is entitled to a work disability in *Dominquez*.[10] None of the parties in *Dominquez* have filed a petition for discretionary review with the Kansas Supreme Court. *Dominquez* was not decided when ALJ Clark issued his Award. The Kansas Court of Appeals in *Dominquez* held,

> K.S.A. 2008 Supp. 44-508(b) broadly defines the term employee without exempting undocumented workers. Moreover, we have found no reference to immigration status within the entire Workers Compensation Act. Under the legislative scheme that is presented, [we] must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. *Bergstrom*, 289 Kan. at 607-08. Accordingly, we hold that the Board did not err in its determination that Dominquez is entitled to permanent partial benefits based on work disability.

Based upon the analysis in *Dominquez*, the Board finds claimant is entitled to permanent partial disability benefits based on work disability. ALJ Clark did not determine claimant's wage loss or task loss. Claimant testified he was discharged by respondent after October 5, 2010, and Karen Crist Terrill's report indicated claimant's last day of work with respondent was October 20, 2010. It is uncontroverted that from October 21, 2010, through February 28, 2011, claimant had a 100% wage loss. It is further uncontroverted that from March 1, 2011, through April 30, 2011, claimant had wages of $300.00 per week, which is a 62% wage loss. Commencing May 1, 2011, claimant again has a 100% wage loss as he is no longer working.

After careful consideration, the Board finds that claimant has a 29% task loss. Drs. Carabetta and Estivo restricted claimant to lifting no more than 50 pounds. Dr. Estivo testified that based upon his restrictions, claimant has a 29% task loss. He indicated claimant responded well to treatment and returned to work. Dr. Carabetta also noted that claimant returned to work within the 50-pound lifting restriction. Although claimant testified that when he was released to work by Dr. Estivo he still had back and leg pain, he did not testify that he was unable to perform his regular job tasks when he returned to work for respondent.

CONCLUSION

1. Claimant proved by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

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[10] *Dominquez v. Gottschalk Brothers Roofing,* No. 105,985, 2012 WL 2715618 (unpublished Kansas Court of Appeals opinion filed June 29, 2012).

2. Claimant has a 10% permanent whole body functional impairment.

3. Claimant is entitled to a work disability and has a 29% task loss. He has the following wage losses: October 21, 2010, through February 28, 2011, a 100% wage loss; March 1, 2011, through April 30, 2011, claimant had net earnings of $300.00 per week, which results in a 62% wage loss; and commencing May 1, 2011, claimant again has a 100% wage loss. That results in the following work disability: October 21, 2010, through February 28, 2011, a 65% work disability; March 1, 2011, through April 30, 2011, a 46% work disability; and commencing May 1, 2011, claimant again has a 65% work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the April 5, 2012, Award entered by ALJ Clark by finding claimant is entitled to a work disability as set out above.

Jose Juan Solis is granted compensation from Quality Granite & Marble, Inc., and its insurance carrier for a December 10, 2009, accident and resulting disability. Based upon an average weekly wage of $790.46, Mr. Solis is entitled to receive the following disability benefits:

Mr. Solis is entitled to receive 20.43 weeks of temporary total disability benefits at $527.00 per week, or $10,766.61.

For the period ending October 20, 2010, Mr. Solis is entitled to receive 24.43 weeks of permanent partial general disability benefits at $527.00 per week, or $12,874.61, for a 10% permanent partial general disability.

For the period from October 21, 2010, through February 28, 2011, Mr. Solis is entitled to receive 18.71 weeks of permanent partial general disability benefits at $527.00 per week, or $9,860.17, for a 65% permanent partial general disability.

For the period from March 1, 2011, through April 30, 2011, Mr. Solis is entitled to receive 8.71 weeks of permanent partial general disability benefits at $527.00 per week, or $4,590.17, for a 46% permanent partial general disability.

[11] K.S.A. 2011 Supp. 44-555c(k).

For the period commencing May 1, 2011, Mr. Solis is entitled to receive 117.47 weeks of permanent partial general disability benefits at $527.00 per week, or $61,908.44, for a 65% permanent partial general disability. The total award is not to exceed $100,000.00.

As of August 10, 2012, Mr. Solis is entitled to receive 20.43 weeks of temporary total disability compensation at $527.00 per week in the sum of $10,766.61, plus 118.71 weeks of permanent partial general disability compensation at $527.00 per week in the sum of $62,560.17, for a total due and owing of $73,326.78, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $26,673.22 shall be paid at $527.00 per week until paid or until further order of the Director.

All reasonable and related medical treatment expenses are ordered to be paid by respondent as authorized medical benefits.

The record does not contain a filed fee agreement between claimant and his attorney, William L. Phalen. K.S.A. 44-536(b) requires that a written contract between the employee and his or her attorney be filed with the Director for review and approval. Claimant's former attorney Chris A. Clements has filed a written contract for attorney fees and filed an attorney's lien for attorney fees and expenses. Should Mr. Phalen desire a fee be approved, he must file and submit his written contract to the ALJ for approval. Any dispute over attorney fees between Mr. Phalen and Mr. Clements shall be resolved by the ALJ.

The Board adopts the remaining orders set forth in the Award to the extent they are consistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

BOARD MEMBER

BOARD MEMBER

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